No. 77-6910



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

BENSON JOSEPH DONOHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 575 F.2d 718.

## JURISDICTION

The judgment of the court of appeals was entered on May 12, 1978. A petition for rehearing was denied on July 13, 1978. The petition for a writ of certiorari was filed on June 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether petitioner, whose defense was based on entrapment, should have been permitted to introduce evidence of specific past acts of good conduct to demonstrate that he lacked a predisposition to commit the offense.

## STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on three



counts of unlawfully possessing and transferring a firearm, in violation of 26 U.S.C. 5861(d) and (e). Petitioner was sentenced to concurrent terms of two years' imprisonment on each count; execution of the prison sentence was suspended and petitioner was placed on probation for a period of two years. The court of appeals affirmed (Pet. App. I).[1/]

The evidence at trial showed that in September 1975 Edward Vercelli, a friend of petitioner, notified law enforcement officials of his suspicion that petitioner was engaged in illegal sales of unregistered firearms. In early October, at the government's request, Vercelli introduced petitioner and his co-defendant, Edward Cocchiola, to Daniel Ryan, an undercover agent assigned to the Bureau of Alcohol, Tobacco, and Firearms (I Tr. 26). In a conversation that occurred in petitioner's presence, Cocchiola told Ryan that he had a Maxim silencer for sale (I Tr. 36, II Tr. 46-47). Subsequently, petitioner advised Ryan that the Maxim silencer was available at his house and that Vercelli and Cocchiola were there also (II Tr. 53). Ryan agreed to meet with petitioner to consummate the sale (II Tr. 53-54). Later that day, Ryan met petitioner at Vercelli's home where petitioner sold Ryan the silencer for $200 (II Tr. 54-55, Gov't. Exh. 1).

Vercelli testified that Cocchiola had previously delivered the silencer to petitioner (I Tr. 35) and that he and petitioner were offered a 10 percent commission by Cocchiola for any firearms they sold to Ryan (I Tr. 38). It was further shown that neither petitioner nor Cocchiola had a Maxim silencer registered in their names or any pending applications for registration (II Tr. 58).

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1/ Petitioner's co-defendant, Salvatore Edward Cocchiola, was convicted on the same counts and received an identical sentence. He did not appeal his conviction.

Petitioner testified on his own behalf and presented an entrapment defense. Petitioner stated that, at the time of the offenses involved in this case, he was employed at a jewelry store where his regular duties included the sale of firearms and ammunition (II Tr. 208). Petitioner testified that he was aware of the firearms registration requirements (id. at 210-211), and that he had never knowingly violated them in the sale of a weapon (III Tr. 57). Petitioner stated that when Vercelli attempted to involve him in unlawful firearms sales he had initially resisted him, but that his resistance was eventually overborne by Vercelli's persistence, appeals to their friendship, and apparent need for the money (II Tr. 217-248, III Tr. 5-52). Petitioner's testimony was corroborated by his wife (III Tr. 141-164).

Petitioner also sought to establish his lack of predisposition to commit the firearms offense through the testimony of four other witnesses. John Adams, a special agent with the United States Customs Service, testified that petitioner appeared as a government witness in a 1974 prosecution of two firearms violators (III Tr. 180). The court would not allow further examination of Mr. Adams, ruling that petitioner's voluntary cooperation in the previous firearms prosecution was irrelevant (III Tr. 182). John Gannoway, a firearms salesman and acquaintance of petitioner, testified that in his gun dealings with petitioner over the prior three years petitioner had always acted honestly and legally (III Tr. 188). Jody Numbers, a gun collector and acquaintance of petitioner, testified that in all of their personal contacts petitioner never indicated any desire or willingness to obtain illegal guns (III Tr. 191). He further stated that, in his opinion, petitioner was trustworthy and honest (III Tr. 193). Finally, Harry Koch, a local police detective, stated that



he believed petitioner to be above reproach with respect to his honesty and legality in firearms sales (III Tr. 197).

Petitioner also sought to introduce, through these witnesses, evidence of his specific past conduct to show that he lacked the predisposition to deal in unregistered firearms. The court refused to allow petitioner to introduce such evidence at trial (III Tr. 183, 188, 192, 197-198) but allowed petitioner to make an offer of proof out of the presence of the jury. According to petitioner's offer of proof, Koch would have testified that petitioner strictly abided by federal regulations and required customers to complete registration forms before he would even allow guns to be removed from the store for examination (III Tr. 220-221). Gannoway and Numbers would have testified that in past discussions about illegal weapons, petitioner never indicated that he was involved in unlawful trafficking, purchasing, or selling (III Tr. 221). Lastly, Gannoway and an additional witness, Bob Short, whose testimony was previously held to be inadmissible (III Tr. 182-183), would have stated that in late September 1975, when petitioner was offered the opportunity to purchase a truckload of illegal weapons, petitioner contacted law enforcement officers and provided them with information concerning the serial numbers and types of weapons that had been offered. According to the offer of proof, Short would also have testified that in October 1975 petitioner contacted him and provided him with information concerning individuals who were smuggling military machine guns out of a local Air Force Base, and that this information was ultimately turned over to the Bureau of Alcohol, Tobacco, and Firearms (III Tr. 222-223). Despite the offer of proof, the trial court adhered to its original ruling that specific acts of law-abiding conduct were inadmissible (III Tr. 198, 222).

The court of appeals affirmed (Pet. App. 1-6).

DISCUSSION

Petitioner contends that the trial court erred in excluding evidence of prior acts of good conduct offered by petitioner to establish that he lacked a predisposition to commit the offense.

1. The defense of entrapment involves two separate factual enquiries: (1) whether the crime was initiated or induced by the government, and (2) if there was inducement, whether the defendant was nevertheless predisposed to commit the act without any persuasion. The burden is on the defendant to come forward with evidence to show that the offense was induced by government action; once he has done so, it is then the government's burden to prove that the defendant was nonetheless predisposed to commit the offense. United States v. Steinberg, 551 F.2d 510, 513-514 (C.A. 2); United States v. Hermosillo-Nanez, 545 F.2d 1230, 1232 (C.A. 9), certiorari denied, 429 U.S. 1050; United States v. Pickle, 424 F.2d 528, 529 (C.A. 5); Sagansky v. United States, 358 F.2d 195, 203 (C.A. 1), certiorari denied, 385 U.S. 816.[2/] Since government inducement is not of itself improper, Sorrells v. United States, 287 U.S. 435, 451, the entrapment defense is primarily concerned with the defendant's predisposition to commit the offense. Hampton v. United States, 425 U.S. 484, 488; United States v. Russell, 411 U.S. 423, 429.

The court of appeals ruled in this case that a defendant may not seek to prove that he lacked predisposition by introducing evidence of his specific prior acts of good conduct. The court characterized such evidence as proof of "character" and therefore considered the case to be controlled by Rule 405(b) of the Federal Rules of Evidence, which allows proof of character by "specific instances of * * * conduct" only when "character or a trait of character of a person is an essential element of a charge, claim, or defense * * *." The court agreed that character is "relevant to the entrapment defense because it may make more probable than not that a defendant possessed a certain state of mind" and that proof of the defendant's character by reputation or opinion is admissible to show lack of predisposition under Rule 405(a) of the Federal Rules of Evidence (Pet. App. 3).[3/] But the court held that specific acts of good conduct may not be proven under Rule 405(b) since character is not an "essential element" of the defense of entrapment, reasoning that "predisposition concerns the defendant's state of mind prior to the inducement" rather than his character (ibid.).

Decisions in this Court and in other courts of appeals have adopted a broader view of the nature of the inquiry concerning "predisposition." In Sorrells v. United States, supra, this Court did not limit the question of "predisposition" to a search for the defendant's "state of mind" at the time of the inducement. The Court stated that the "controlling question" is whether "the defendant is a person otherwise innocent" who has been induced by the government to participate

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2/ The cases differ somewhat on the quantum of proof required on the question of inducement, whether the defendant must simply "come forward" with evidence of inducement (United States v. Hermosillo-Nanez, supra; Sagansky v. United States, supra), or prove it by a preponderance of the evidence (United States v. Steinberg, supra).

3/ Fed. R. Evid. 405(a) provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

in the criminal conduct. 287 U.S. at 451.[4] See also Sherman v. United States, 356 U.S. 369, 371; Palido v. United States, 425 F.2d 1391, 1393 (C.A. 9); Whiting v. United States, 296 F.2d 512, 516 (C.A. 1). Other courts have held specifically that "predisposition" is a term which embraces the defendant's "character" as well as his immediate intentions, and that proof of predisposition may thus be made either through reputation or opinion evidence or by evidence of relevant prior conduct. Whiting v. United States, supra; Acardi v. United States, 257 F.2d 168, 171 (C.A. 5), certiorari denied, 358 U.S. 883. See also United States v. Reynoso-Ulloa, 548 F.2d 1329 (C.A. 9). It would appear to follow from these cases that a defendant's character, or a specific trait of his character,[5] is "an essential element" of the defense, and that evidence of specific relevant instances of conduct is therefore admissible under Rule 405(b).

But it ultimately makes no difference whether relevant instances of conduct are admissible to prove character under Rule 405(b). The conclusion that evidence of specific conduct may not be offered to prove "character" does not dispose of the possibility that the evidence is admissible for other purposes.[6] Thus, it is well settled that when a defendant

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4/ In Sorrells, the Court stated that the evidence to be adduced when the defense of entrapment is raised includes "an appropriate and searching inquiry into the [defendant's] conduct and predisposition as bearing upon that issue." 287 U.S. at 451.

5/ I.e., the defendant's integrity and honesty in dealing in transactions of the type involved in the criminal trial.

6/ Indeed, Rule 404(b) of the Federal Rules of Evidence specifically authorizes proof of "other crimes, wrongs or acts" for "purposes * * * such as proof of motive, opportunity, intent, preparation, plan, knowledge, * * * or absence of mistake or accident." If the government were permitted to rely on this Rule to introduce relevant "bad" acts of conduct bearing on "intent" but the defendant were precluded from using the Rule to prove relevant "good" acts of conduct bearing on the same issue, a question of constitutional fairness under the Fifth and Sixth Amendments would conceivably be raised.

[Continued]



raises the issue of entrapment the government may prove specific instances of prior criminal activity to show that the defendant possessed a state of mind or intent suggesting his predisposition to commit the offense. See United States v. Watkins, 537 F.2d 826, 827 (C.A. 5) (citing cases); United States v. Ambrose, 483 F.2d 742, 748 (C.A. 6); United States v. Brown, 453 F.2d 101, 107-108 (C.A. 8), certiorari denied, 405 U.S. 978. The only constraints on the use of such evidence are that it must be relevant and not outweighed by any danger of confusion or unfair prejudice, or unduly burdensome or repetitious. Fed. R. Evid. 402, 403; see United States v. Ambrose, supra, 483 F.2d at 748. Accordingly, even under the analysis adopted by the court of appeals in this case (Pet. App. 3), evidence of specific prior acts of conduct should be admitted if it is relevant to prove the defendant's "intent" or "state of mind."

Like considerations suggest that specific acts of good conduct can be relevant to showing lack of predisposition. To be sure, even a person whose moral record is unblemished may harbor a criminal predisposition. But that reality bears on the weight of such evidence rather than on its relevance in a particular case. Evidence is "relevant" when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. While evidence that a person with many prior opportunities had never committed a crime may have little or no bearing on whether he committed the crime on the precise

occasion charged in the indictment, see United States v. Shapiro, 159 F.2d 890 (C.A. 2), affirmed, 335 U.S. 1, such evidence may nonetheless be relevant to the question whether the defendant's prior conduct reveals that he possessed a predisposition to commit the offense on the single occasion when the government induced his participation.

It is true, of course, that evidence of prior misconduct has a greater "logical solidity" [7] toward establishing a defendant's improper disposition than evidence of good conduct has in negating that disposition. Even a hardened criminal would not be likely to accept every available opportunity for criminal conduct. Moreover, evidence of good conduct could often wander far afield from the precise question of predisposition to be determined at trial. A trial court should thus carefully scrutinize proferred evidence of good conduct to determine whether it is sufficiently proximate in time and nature to the alleged offense, and sufficiently unambiguous, that it can be said to bear meaningfully on the defendant's lack of a criminal disposition at the time of the government's inducement. Evidence that is repetitious, misleading, or confusing should, of course, be refused. The court's determination as to the admissibility of such evidence would involve a complex and inherently factual assessment of the significance of the evidence in the context of a particular case, and would be subject to reversal only for the clearest abuse of discretion. See United States v. Catalano, 491 F.2d 268 (C.A. 2), certiorari denied, 419 U.S. 825.

2. The court of appeals concluded that, even assuming that prior acts of good conduct may in some contexts be admissible to show a defendant's lack of predisposition,

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7/ Whiting v. United States, supra, 296 F.2d at 516.



"[m]uch of the testimony concerning specific acts of the defendant was remote and the District Court was well with its discretion in ruling it not relevant" (Pet. App. 3-4). With regard to the testimony offered by witnesses Koch (specific legal weapons transaction; III Tr. 220-221), Gannoway (conversations concerning legal weapons transactions; III Tr. 221); and Numbers (same; III Tr. 221), the district court ruled specifically that the evidence was not "relevant as to time, place and anything else" (III Tr. 222). The exclusion of this evidence on grounds of remoteness seems well within the discretion of the district court.

The district court did not, however, make a similar determination with regard to the testimony offered by witness Short. This witness would have testified that on two occasions, during the precise period of the offense proven at trial, the defendant became aware of planned illegal weapons transactions, reported the incidents to law enforcement officials, and assisted in the official investigations (III Tr. 222-223). One of the incidents involved a purported attempt to sell a "truck load of weapons" and the other involved the smuggling of machine guns out of a nearby Air Force base (ibid.). The petitioner's attorney stated that (ibid.):

> The purpose of this testimony, Your Honor, is to show that at the very time when the Government is alleging that Mr. Donoho was conspiring to sell the illegal weapons, he was, in fact, voluntarily assisting the government. * * * We think that it shows that he did not have a predisposition to commit these crimes.

The district court did not reject this evidence on the ground that it was remote. Instead, the court stated that the evidence seemed inconsistent with the fact that petitioner had not reported other illegal weapons activity and that, in any

event, the evidence was "not admissible" (III Tr. 224). Since the court did not explain its ruling, it is unclear why the court rejected the evidence. It cannot be said from the trial transcript whether the district court was exercising its discretion to exclude the evidence under Rule 403, or was instead of the view (adopted by the court of appeals) that the court had no discretion because evidence of specific conduct was inadmissible under Rule 405(b).[8/]

Since the court did not base its ruling on an exercise of its discretion under Rule 403, it is the view of the United States that this evidence should have been allowed at trial. The evidence offered in this case -- that the petitioner not only declined to take advantage of contemporaneous opportunities to commit similar offenses, but also reported the incidents to police officers and assisted in their subsequent investigation -- would seem to constitute a paradigm of the narrow context in which evidence of prior good conduct bears meaningfully on the defendant's lack of predisposition to commit the crime charged. The evidence was close in time, similar in nature, and unequivocal in content. In these special circumstances, we believe the proffered evidence of good conduct might properly have been admitted in the discretion of the trial court. Since it does not appear that the court exercised its discretion in rejecting this evidence, we must conclude that the ruling of the district court was in error.

Nor can we say that this evidence was of only limited probative value and that its exclusion was harmless error. Petitioner's defense was predicated wholly on the theory of entrapment. While petitioner was allowed to introduce opinion and reputation evidence as to his good character, see pp. 3-4 and 6, supra, the evidence of his cooperation with law enforcement officers at the time of the events proven at trial was likely to have received serious consideration by the jury. We therefore agree that petitioner is entitled to a new trial in this case.

8/ When the court first excluded evidence of specific acts at the trial, the court noted that the witness was appearing "as a character witness" (III Tr. 181). Petitioner's attorney argued that proof of specific acts was admissible in this case under Rule 405(b) because the petitioner's honesty in gun dealings was a character trait that was an essential element of petitioner's entrapment defense (III Tr. 220). The court did not comment on this contention.



## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court either for reconsideration in light of the position now taken by the United States or with instructions that the district court's judgment be vacated and the case be remanded to that court for a new trial.

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